Supreme Court, U.S.
FILED
OCT 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-548

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

NICODEAN MARK BILECKI AND
EDNA MAE BILECKI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
SHIRLEY D. PETERSON
Assistant Attorney General
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

QUESTIONS PRESENTED

1. Whether petitioners are entitled to a new trial because a venireperson against whom petitioners had exercised a peremptory challenge took the place of a proper member of the jury.

2. Whether petitioners are entitled to a new trial because the government did not object to their motion for a new trial at the time it was made but moved for reconsideration after it was granted.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Acosta v. *State*, 522 S.W.2d 528 (Tex. Crim. App. 1975) 6
Anderson v. *State*, 142 Tex. Crim. 384, 154 S.W.2d 482 (1941) 6
Ross v. *Oklahoma*, 108 S. Ct. 2273 (1988) 9
Sherman v. *State*, 2 Ga. App. 148, 58 S.E. 393 (1907) 6
State v. *Thompson*, 68 Ariz. 386, 206 P.2d 1037 (1949) 6
Swain v. *Alabama*, 380 U.S. 202 (1965) 9
United States v. *Atkinson*, 297 U.S. 157 (1936) .. 9
United States v. *Cole*, 796 F.2d 380 (11th Cir.), cert. denied, 479 U.S. 952 (1986) 3, 4, 6, 7, 8
United States v. *Frady*, 456 U.S. 152 (1982) 9
United States v. *Levesque*, 681 F.2d 75 (1st Cir.), cert. denied, 459 U.S. 1089 (1982) 6
United States v. *Young*, 470 U.S. 1 (1985) 9

Statutes and rules:

Internal Revenue Code (26 U.S.C.):
§ 7203 (Supp. V 1987) 2
§ 7205 (Supp. V 1987) 2
Fed. R. Crim. P.:
Rule 51 4
Rule 52 4

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-548

NICODEAN MARK BILECKI AND
EDNA MAE BILECKI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 3-31, is reported at 876 F.2d 1128. The district court's order denying petitioners' motion for a new trial, Pet. App. 32-42, is unreported.

JURISDICTION

The judgment of the court of appeals, Pet. App. B, was entered on June 23, 1989. A petition for rehearing was denied on July 27, 1989. Pet. App. A. The petition for a writ of certiorari was filed on September 25, 1989. Pet. 1-23. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the United States District Court for the Southern District of Texas convicted petitioners Nicodean Mark Bilecki and Edna Mae Bilecki of willful failure to file federal income tax returns in violation of 26 U.S.C. 7203 (Supp. V 1987). The jury also convicted Nicodean Mark Bilecki of filing a false withholding certificate (Form W-4) in violation of 26 U.S.C. 7205 (Supp. V 1987). Both petitioners were sentenced to five years' supervised probation and 300 hours of community service. C.A. E.R. 8-10, 18-19.

1. Petitioners waived their right to a jury trial before a district judge in favor of a jury trial before a magistrate. The venire included Mr. Olin Holt and Ms. Lupe Vasquez. During voir dire, the prosecutor questioned Mr. Holt about his prior audit by the IRS. Later, petitioners' counsel questioned Mr. Holt about his prior service on a jury in a criminal case and about his work 25 years earlier as a special deputy sheriff. Petitioners' counsel asked Ms. Vasquez whether the fact that her son was a police officer would affect her impartiality. The magistrate did not discharge either Mr. Holt or Ms. Vasquez for cause. Gov't C.A. Br. 3-5.

After voir dire, petitioners' counsel peremptorily challenged Mr. Holt. Petitioners' counsel deliberated more than 15 minutes while exercising his peremptory challenges, and he rose frequently from his chair at the counsel table to view the venire. Gov't C.A. Br. 5; C.A. E.R. 31.

After petitioners' counsel exercised his peremptory challenges, the courtroom deputy called each member of the jury by name to take his or her place in the jury box. Instead of calling "Ms. Vásquez," however, the deputy called "Mr. Vasquez" to take a seat in the jury box. To compound the error, at that time Mr. Holt took a seat in the jury box. Pet. App. 4, 34. Although petitioners' counsel followed the process on a venire list that revealed that Ms. Vasquez's

spouse had a male name, "Herman," Gov't C.A. Br. Annex C, petitioners' counsel did not object either to the calling of "Mr. Vasquez" or to the seating of Mr. Holt. Moreover, during the seating or soon thereafter, petitioners' counsel told the courtroom deputy that the jurors were apparently not being seated in the order in which they were called, and that he found it difficult to match the jurors called with those who had taken seats in the jury box. Despite his difficulty, however, petitioners' counsel again made no objection and did not request a roll call. Gov't C.A. Br. 6. Mr. Holt sat through the four-day trial and took part in the jury's deliberations. Pet. App. 4, 34.

The parties and the magistrate discovered that Mr. Holt had taken the place of Ms. Vasquez when the jury was polled after returning its verdict. Pet. App. 4-5, 35. The magistrate then held an off-the-record conference in chambers, after which petitioners' counsel moved for a new trial. The government did not object to petitioners' new trial motion at that time, and the magistrate granted the motion. Pet. App. 4-5.

Four days later, the government filed a motion asking the magistrate to reconsider its decision to grant a new trial. The government argued that petitioners had waived any objection to the inadvertent seating of Mr. Holt and requested reinstatement of the verdict. Pet. App. 5, 35. The magistrate denied the government's motion, and the government appealed to a judge of the district court. Pet. App. 35-36.

2. The district judge held that the magistrate had erred in granting petitioners' motion for a new trial and denying the government's motion for reconsideration. Relying on *United States* v. *Cole*, 796 F. 2d 380 (11th Cir.), cert. denied, 479 U.S. 952 (1986), the district judge held that petitioners were entitled to a new trial only if they had exercised sufficient diligence to reveal the mistaken seating of Mr. Holt or had suffered prejudice as a result of the error. Pet. App.

36-39. In this case, the district judge held that petitioners had not exercised sufficient diligence because their counsel "did *not* object to the seating of Mr. Holt in place of Ms. Vasquez" at the time the jury was empaneled and failed to object before the jury rendered its verdict, even though petitioners' counsel "had the opportunity to view the jury during four days of trial." *Id.* at 39. In conclusion, the district judge found that petitioners had "waived any objection to the jury panel by failing to discover and to object to the inadvertent seating of the peremptorily challenged juror." *Ibid.* The district judge did not explicitly state whether the inadvertent seating of Mr. Holt had prejudiced the petitioners.

3. The court of appeals affirmed. It adopted the reasoning of the Eleventh Circuit's decision in *United States* v. *Cole*, 796 F.2d 380 (1986), and noted that *Cole*'s requirements of sufficient diligence and prejudice were "firmly grounded" in Fed. R. Crim. P. 51, which requires timely objections, and Fed. R. Crim. P. 52, which requires a court to disregard harmless errors. Pet. App. 8-9.

Like the district judge, the court of appeals found that petitioners' counsel had not exercised sufficient diligence in this case. The court recognized that "lawyers cannot ordinarily be expected to memorize instantaneously the faces of persons chosen to be on the jury as well as those excused." Pet. App. 9. At the same time, the court pointed out that "the lawyers are in the best position to notice a mistake in time to correct it." *Id.* at 9-10. In this case, the court remarked that petitioners' counsel "did notice, and did call to the clerk's attention, that the jurors were not taking their seats in the order called. Counsel should not then have disregarded his confusion; in this circumstance especially he should have followed through and asked for verification that the proper persons were seated." *Id.* at 10.

The court of appeals "assimilate[d] the prejudice element of *Cole*" when it considered and rejected petitioners' contention that Mr. Holt's service as a juror was a "plain error" that led to a miscarriage of justice. Pet. App. 12. The court concluded that (1) Mr. Holt was qualified to serve, (2) there was no basis to challenge Mr. Holt for cause, (3) there was no reason to suppose that Mr. Holt was biased against the defense or in favor of the prosecution, and (4) Mr. Holt's participation on the jury did not affect the fundamental fairness, honesty, or public reputation of the trial. *Id.* at 11-12.

Finally, the court of appeals held that the government did not waive its objection to a new trial by not responding to petitioners' motion for a new trial at the time it was made. The court determined that the government's prompt motion for reconsideration "adequately served the purpose of the [contemporaneous objection] rule because it gave the court the opportunity to correct itself before any waste of time or resources." Pet. App. 14. Moreover, unlike petitioners' failure to object to the seating of Mr. Holt on the jury, the government "gained nothing by delaying its opposition to the new trial." *Ibid.*

Judge Williams dissented. He argued that "[u]nder the due diligence requirement of *Cole*," petitioners' counsel "did not waive the right to object to the improper juror." Pet. App. 17. In addition, he maintained that requiring petitioners to demonstrate prejudice "in the peremptory strike context defeats the very nature of the peremptory strike right." *Id.* at 25.

ARGUMENT

1. Petitioners renew their contention that they are entitled to a new trial because a member of the venire against whom they had exercised a peremptory challenge took the place of a proper member of the jury. Pet. 10-19.

The inadvertent seating of a peremptorily challenged venireperson does not entitle a defendant to a new trial unless (1) defendant's counsel exercised sufficient diligence to detect the error and bring it to the trial court's attention, or (2) the defendant suffered prejudice. *United States* v. *Cole*, 796 F.2d at 381-382. Cf. *United States* v. *Levesque*, 681 F.2d 75, 80-81 (1st Cir.), cert. denied, 459 U.S. 1089 (1982) (inappropriate seating of alternate juror). Those prerequisites were not satisfied in this case.

a. To be entitled to a new trial a defendant must exercise sufficient diligence to bring the accidental seating of a peremptorily challenged juror to the attention of the trial judge before the jury returns its verdict. Every reported decision on this question has required due diligence. See *United States* v. *Cole*, 796 F.2d at 381 ("If the defendant has not exercised sufficient diligence to perceive the error and call it to the court's attention in timely fashion, prejudice must be shown to obtain a new trial." (citing *Acosta* v. *State*, 522 S.W.2d 528 (Tex. Crim. App. 1975), and *Anderson* v. *State*, 142 Tex. Crim. 384, 154 S.W.2d 482 (1941)); *Sherman* v. *State*, 2 Ga. App. 148, 152-153, 58 S.E. 393, 395 (1907) (ordering new trial because "this defendant, after having positively rejected the juror, was tried by him without fault on his part," and distinguishing a case denying a new trial on the ground that counsel had failed to exercise "due diligence"). See *State* v. *Thompson*, 68 Ariz. 386, 391, 206 P.2d 1037, 1040 (1949) (following *Sherman* v. *State*). In his dissent, Judge Williams also endorsed the requirement of due diligence because defense counsel cannot "depend entirely on the court to seat the jury properly," Pet. App. 18-19; accordingly, he applied the due diligence test of *Cole* to the facts of this case, *id.* at 19. Even petitioners concede that they must satisfy the *Cole* diligence test before they are entitled to a new trial. Pet. 12-16.

Strong policy reasons underlie the requirement that defense counsel exercise diligence in verifying that the proper jury has been seated. To begin with, the diligence requirement prevents a defendant from gambling on a favorable jury verdict and later raising a claim of error if the verdict is unfavorable. See *United States* v. *Cole*, 796 F.2d at 381. Even in cases in which defense counsel's failure to make the objection is negligent rather than willful, the diligence requirement prevents unnecessary retrials and thereby conserves scarce judicial resources.

Because there is no dispute about the governing legal standard, the decision here turns on whether that standard was satisfied on the facts of this case. The question whether petitioners' counsel exercised sufficient diligence is therefore simply a factual issue that does not warrant this Court's review.

First, although petitioners' counsel claimed in the court of appeals that he "was not familiar with all the [venirepersons'] faces for lack of ability to study the faces," Pet. C.A. Br. 6, petitioners' counsel deliberated 15 minutes while exercising his peremptory challenges, C.A. E.R. 31, and he rose frequently from his chair at the counsel table to view the members of the venire, Gov't C.A. Br. 5. Petitioners' counsel was particularly well positioned to become familiar with Mr. Holt and Ms. Vasquez because they were in the first two rows of jurors and petitioners' counsel stood directly in front of them as he questioned them. Gov't C.A. Br. 12, Annex B. Hence, petitioners' counsel should have noticed that Mr. Holt, a man, was taking the place of Ms. Vasquez, a woman. Second, the courtroom deputy's calling of "Mr. Vasquez" to the jury box should have put petitioners' counsel on notice that something was amiss, because the list on which petitioners' counsel was following the seating process indicated that venireperson Vasquez was a woman, not a man. Gov't C.A. Br. Annex C. Third, peti-

tioners' counsel should have requested a roll call to verify that the proper jurors had been seated when he became confused because the jurors were not taking their seats in the order they were called by the courtroom deputy. Pet. App. 10. Finally, whether or not defense counsel was "familiar with the jurors by name and face, he had ample opportunity to observe the jury composition during the trial and detect that there was an extra male juror." *United States* v. *Cole*, 796 F.2d at 382. Thus, petitioners had ample opportunity to object to Mr. Holt's service on the jury well before the jury returned its guilty verdict. The district judge and the court of appeals had a sound factual basis for finding that petitioners' counsel failed to exercise sufficient diligence.

Petitioners contend that the reviewing courts should have deferred to the magistrate's comment that "I find from all appearances that this is no fault of any party." C.A. E.R. 51. The magistrate's finding, however, did not address the proper issue. It was irrelevant under the *Cole* test whether petitioners' counsel caused the erroneous seating of Mr. Holt; instead, the proper inquiry was whether petitioners' counsel had been sufficiently diligent in discovering the error. And even if the magistrate's comment could be interpreted as addressing the due diligence issue, it was entitled to little weight when measured against the compelling indications that petitioners' counsel failed to exercise diligence in detecting the erroneous seating of the juror.

b. Mr. Holt's substitution for Ms. Vasquez on the jury in this case caused no prejudice to the petitioners. As the court of appeals determined, Mr. Holt was qualified to serve as a juror; there was no basis for a challenge for cause; there was no reason to suppose that Mr. Holt was biased for or against either party; and Mr. Holt's service did not affect the fundamental fairness of the trial. Pet. App. 11-12.

For those reasons, the unintentional seating of Mr. Holt as a juror was not plain error. This Court has held that "the

plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " *United States* v. *Young*, 470 U.S. 1, 15 (1985) (quoting *United States* v. *Frady*, 456 U.S. 152, 163 n. 14 (1982)). Such circumstances are those in which particularly egregious errors seriously affect the fairness, integrity, or public reputation of judicial proceedings. *United States* v. *Young*, 470 U.S. at 15; *United States* v. *Frady*, 456 U.S. at 163; *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). The error in this case clearly does not rise to that level.

Contrary to petitioners' submission, testing for prejudice or plain error where a party has not objected to the erroneous seating of a peremptorily challenged juror does not "undermine[ ] the very justification for peremptory challenge." Pet. 19. Of course, a peremptory challenge is exercised independent of any basis for a challenge for cause. For that reason, it is sometimes said that denial of the defendant's right to a peremptory challenge is reversible error without the need to show prejudice. *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965). But see *Ross* v. *Oklahoma*, 108 S. Ct. 2273, 2278-2279 (1988). In this case, however, petitioners have not been denied the right to a peremptory challenge: their counsel's lack of diligence allowed a peremptorily stricken venireperson to take a seat on the jury. In that circumstance, counsel's failure to object to the seating of a stricken venireperson is tantamount to a failure to exercise the right to make a peremptory challenge. It follows that the courts below, in declining to excuse petitioners' failure to object absent a showing of prejudice, did not act contrary to the rationale underlying peremptory challenges.

In any event, from the paucity of appellate decisions on this issue, it is clear that problems like the one that arose in this case occur very infrequently. The decision in this case will therefore not have a significant impact on the ad-

ministration of the criminal justice system. For that reason as well, this case does not merit review by this Court.

2. Petitioners also contend, Pet. 19-23, that the government waived any objection to petitioners' motion for a new trial by not objecting to it at the time it was made. As the court of appeals held, however, the government's motion for reconsideration was sufficiently timely to satisfy the contemporaneous-objection rule. Pet. App. 13-14. Not only did the government's motion give the trial court an opportunity to correct its error before any waste of time or resources had occurred, but the government gained nothing by failing to make an immediate objection to the new trial motion. *Id.* at 14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

OCTOBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262 203/00579